

Enforcing Nonenforcement: Countering the Threat Posed to Sanctuary Laws by the Inclusion of Immigration Records in the National Crime Information Center Database

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Across the United States, local police officers are playing an increasingly active role in the enforcement of federal immigration laws against the nation's estimated 12 million illegal immigrants.¹ Immigration-related detentions resulting from contact with local officers have dramatically increased in recent years.² In some jurisdictions, local enforcement initiatives have resulted in the arrests of hundreds of illegal immigrants in a matter of days.³

The National Crime Information Center database ("NCIC") is making

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1. JEFFERY S. PASSEL, PEW HISPANIC CTR., *THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.* i (2006) available at <http://pewhispanic.org/files/reports/61.pdf> (reporting that an estimated 11.5 to 12 million unauthorized migrants reside in the United States and defining an illegal migrant as someone who "resides in the United States but who is *not* a U.S. citizen, has *not* been admitted for permanent residence, and is *not* in a set of specific authorized temporary statuses permitting longer-term residence and work"). News reports generally concur with this estimated population size. See, e.g., Editorial, *One Argument, 12 Million Holes*, N.Y. TIMES, Jan. 18, 2008, at A20. For clarity, this comment adopts the Pew Hispanic Center's definition, but uses the more readily understood term "illegal immigrant" rather than "illegal migrant."

2. Law Enforcement Support Center Fact Sheet, <http://www.ice.gov/pi/news/factsheets/lesc.htm> (last visited May 10, 2008) [hereinafter LESC Fact Sheet].

3. See, e.g., Mike Glenn, *HPD Turns Over 3 to Immigration Officials*, HOUSTON CHRON., Oct. 20, 2006, at B3 (reporting that a new policy in Houston requiring officers to inquire into immigration status during all encounters resulted in the detention of 229 people in the program's first five days); John Pomfret & Sonya Geis, *One Sheriff Sees Immigration Answer as Simple*, WASH. POST, May 20, 2006, at A03 (reporting that a new initiative in Phoenix led to the arrest of 170 illegal immigrants within three months).

these local immigration enforcement efforts easier and more efficient than ever. Maintained by the Federal Bureau of Investigations ("FBI"), the NCIC is a catalog of information on arrest warrants, wanted persons, and missing property that local law enforcement officers can access in the course of their investigations.⁴ In 1996, the database began including records concerning criminal immigration violations, such as re-entering the United States following deportation.⁵ The immigration data available through the NCIC thereafter steadily increased as federal law classified an increasing array of immigration violations as criminal, rather than civil, offenses.⁶ Not all immigration violations are criminally prosecutable, however; some continue to carry civil penalties only, including overstaying a visa or failing to leave the country following a deportation order.⁷ In 2002, the NCIC began to include records of these civil immigration violations in addition to criminal records.⁸

Some jurisdictions have resisted local enforcement of immigration law. Starting in 1979, before the NCIC even included immigration violation records, cities began to pass ordinances restricting the role of local authorities in immigration enforcement. Known as "sanctuary policies," these ordinances now exist in four states and almost seventy cities and counties.⁹ Sanctuary policies vary in approach and scope, but all distinguish between local and federal roles in the enforcement of immigration statutes and restrict the role that local authorities will perform.¹⁰ These policies can take the form of statutes,

4. LESC Fact Sheet, *supra* note 2.

5. Press Release, Fed. Bureau of Investigation, An NCIC Milestone (Mar. 23, 2002), available at <http://www.fbi.gov/pressrel/pressrel02/ncic032302.htm>; see also Immigration and Nationality Act § 276, 8 U.S.C. § 1326 (2000) (defining criminal immigration violations).

6. Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime and Sovereign Power*, 56 AM. U. L. REV. 367, 369 (2006) (explaining the dramatic increase in deportations and criminal consequences for both legal and illegal immigrants convicted of crimes).

7. See Immigration and Nationality Act § 276, 8 U.S.C. § 1326 (2000).

8. John Ashcroft, U.S. Att'y Gen., Prepared Remarks on the National Security Entry-Exit Registration System (June 6, 2002), available at <http://www.usdoj.gov/archive/ag/speeches/2002/060502agpreparedremarks.htm> (introducing the National Security Entry-Exit Registration System and explaining that federal officers would input civil immigration records into the NCIC as part of this new enforcement measure).

9. NAT'L IMMIGRATION LAW CTR., LAWS, RESOLUTIONS AND POLICIES INSTITUTED ACROSS THE U.S. LIMITING ENFORCEMENT OF IMMIGRATION LAWS BY STATE AND LOCAL AUTHORITIES (Dec. 2008), available at <http://www.nilc.org/immlawpolicy/LocalLaw/localaw-limiting-tbl-2008-12-03.pdf> (listing all locally adopted laws, resolutions and policies limiting local enforcement of immigration law) [hereinafter SANCTUARY LAWS CHART]. This Comment follows the National Immigration Law Center's approach and defines "sanctuary policy" as all laws, resolutions, and policies limiting local enforcement of immigration law; see also Ohio Jobs & Justice PAC, Sanctuary City, USA, <http://www.ojjpac.org/sanctuary.asp> (last visited May 20, 2008) (adopting a broader definition of "sanctuary" than the National Immigration Law Center and listing both official policies found on the Sanctuary Laws Chart as well as "informal" and unwritten policies favoring immigrants that the Ohio Jobs & Justice PAC believes are in place in some cities) [hereinafter PAC Sanctuary Laws List].

10. See LISA M. SEGHEITTI, STEPHEN R. VINA & KARMA ESTER, CONG. RES. SERV., ENFORCING IMMIGRATION LAW: THE ROLE OF STATE AND LOCAL LAW ENFORCEMENT 26 (2006).

ordinances, resolutions, and executive orders adopted at either the local or state level.¹¹

Despite the increasing popularity of sanctuary policies, academics and practitioners have not closely examined the viability of the sanctuary movement.¹² Most critics of local immigration enforcement have concentrated instead on preventing local enforcement through judicial intervention or policy changes at the federal level.¹³ These efforts to curtail local immigration enforcement by judicial decree or federal policy changes may eventually succeed. In the meantime, the sanctuary movement serves a critical function because sanctuary policies offer the only immediate means for limiting local immigration enforcement.

Problematically, many sanctuary policies may fail to fulfill their intended purpose of limiting local enforcement. Sanctuary policies may fail to operate effectively as a direct result of federal initiatives, particularly the inclusion of immigration data in the NCIC. By disseminating criminal and civil immigration information, the NCIC encourages local officers to enforce immigration law in contravention of local measures intended to prevent enforcement. An officer's use of the NCIC automatically alerts her to all criminal and civil immigration data available and, if an immigration violation "hit" arises, the NCIC advises the officer to contact federal authorities immediately. By so operating, the NCIC undermines the ability of local enforcement officers to utilize their own discretion in deciding both when to investigate a person's immigration status, and when to enforce immigration violations. By indiscriminately presenting immigration information, even when unwanted by officers, the NCIC encourages local officers to acquiesce to federal enforcement priorities despite potential conflicts with local sanctuary policies.

This Comment illuminates the negative impact that the increased availability of immigration data through the NCIC has had on the sanctuary movement and proposes solutions to ensure the continued viability of sanctuary policies. Part I addresses the scope and character of sanctuary policies. Part II explains why the sanctuary movement should be protected and examines the

11. *Id.*

12. *But see* Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1455 (2006) (discussing the effectiveness of local sanctuary laws, but without examining potential remedies).

13. For leading voices in this debate, compare Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 967 (2004) (arguing that local officers lack constitutional authority to enforce immigration law) [hereinafter Pham I], and Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1096 (2004) (criticizing the insertion of immigration information into the NCIC as unlawful), with Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179 (2005) (supporting the Department of Justice's position that local enforcement officers possess inherent authority under the Constitution to make arrests for violations of federal immigration laws).

legal authority that allows local enforcement officials to adhere to nonenforcement policies. Part III demonstrates how federal data-sharing encourages local enforcement of immigration law and thereby weakens the effectiveness of locally adopted sanctuary policies. Finally, Part IV offers three proposals that may counteract the threat to sanctuary policies posed by the inclusion of immigration information in the NCIC.

I

THE SCOPE AND CHARACTER OF SANCTUARY POLICES

To examine the threat that NCIC data-sharing poses to sanctuary policies, it is useful first to examine the origins, scope, and weaknesses of the sanctuary movement. Effective reform will require building on the foundation of the policies currently in place.

A. Local Enforcement of Immigration Law Before 1979

The rise of sanctuary policies is striking against the backdrop of local officials' traditionally active role in immigration enforcement. Immigration was explicitly the province of state authorities under the Articles of Confederation.¹⁴ The Constitution granted Congress the power to regulate the naturalization of aliens and commerce with foreign nations, but does not discuss immigration authority with greater specificity.¹⁵ Federal regulation of immigration began in earnest only in 1875, when Congress passed the first exclusionary immigration law, barring entry to convicts and prostitutes.¹⁶ In 1891, Congress established the first system for inspecting entrants to the United States in the Bureau of Immigration, the precursor to the Immigration and Naturalization Services ("INS") and ultimately Immigration and Customs Enforcement ("ICE").¹⁷

Throughout the 1800s, and as recently as the 1970s, local police officers contributed significantly to national immigration enforcement efforts. In the

14. See THE FEDERALIST No. 42, at 285-86 (James Madison) (Jacob E. Cooke ed., 1961) (discussing the ability of states to adopt their own varied immigration policies under the Articles of Confederation and arguing that granting this level of authority to the states jeopardized the nation as a whole); see also *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 872 (1995) (Thomas, J., dissenting) ("Before the Constitution was adopted, citizenship was controlled entirely by state law, and the different States established different criteria.").

15. U.S. CONST. art. 1, § 8; see also WILLIAM F. McDONALD, STATE AND LOCAL LAW ENFORCEMENT, TRANSNATIONAL CRIMINALITY, AND ILLEGAL IMMIGRATION: THE CHANGING BOUNDARIES OF LAW ENFORCEMENT 16 (July 20, 2001), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/188876.pdf>.

16. Act of Mar. 3, 1875, 18 Stat. 477 § 5.

17. Act of Mar. 3, 1891, 26 Stat. 1084. Shortly thereafter, the Supreme Court explicitly recognized federal authority over immigration enforcement. See *Ekiu v. United States*, 142 U.S. 651, 658 (1892) ("In the United States this [immigration] power is vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war.").

1930s, the New York Police Department maintained a Criminal Alien Bureau devoted to investigating illegal immigrants subject to deportation.¹⁸ Between the 1930s and 1950s, border states in the Southwest partnered with the INS to conduct raids on illegal immigrants.¹⁹ A national field study by criminal law scholar William F. McDonald found that, as late as the 1970s, many local enforcement agencies had policies directing officers to stop and detain people suspected of violating immigration laws.²⁰

Since the 1970s, however, many localities have abandoned efforts to enforce immigration laws.²¹ The shift away from local involvement occurred as immigration law grew significantly more complex and illegal immigration rates steadily increased.²² Local law enforcement officers, faced with an increasingly complicated body of law and a larger population to which these laws might apply, redirected their enforcement efforts to other matters. At the same time, the civil rights movement sensitized the public to the interests of minority communities, prompting disdain for the racial profiling tactics common in local immigration enforcement efforts.²³ In an effort to address these concerns while combating crime, police officials and local politicians began to embrace a new “community policing” philosophy that emphasized controlling crime by building local networks and encouraging community cooperation.²⁴ These trends, particularly the community policing philosophy, convinced many future sanctuary advocates that local law enforcement should focus exclusively on local concerns and leave immigration enforcement to federal officers.

B. The Rising Popularity of Sanctuary Policies

In the context of these converging trends, the Los Angeles Police Department (“LAPD”) adopted the country’s first sanctuary policy in 1979. Citing a recent influx of immigrants to Los Angeles, the LAPD adopted a department-wide policy intended to prevent local police officers from enforcing immigration law. The goal of the LAPD’s policy, known as Special Order 40, was to improve cooperation between the LAPD and the communities it serves.²⁵ To accomplish this goal, the order stated that “undocumented alien

18. ROGER L. ABEL, *THE BLACK SHIELDS* 70 (2006).

19. McDONALD, *supra* note 15, at 16.

20. *Id.* at 16; see also Robert S. Chapman & Robert F. Kane, *Illegal Aliens and Enforcement: Present Practices and Proposed Legislation*, 8 U.C. DAVIS L. REV. 127, 149 (1975) (describing historical trends in local enforcement of immigration law).

21. McDONALD, *supra* note 15, at 23 (detailing results from a 250-person survey of law enforcement personnel, field observations, and eight conferences and working groups).

22. Stumpf, *supra* note 6, at 369 (explaining the dramatic increase in deportations and criminal consequences for both legal and illegal immigrants convicted of crimes).

23. McDONALD, *supra* note 15, at 16.

24. Michelle Chernikoff Anderson & Howard Giles, *Fairness and Effectiveness in Policing: The Evidence*, 55 J. COMM. 872, 872–874 (2005) (book review); see also Tracey L. Meares, *Praying for Community Policing*, 90 CALIF. L. REV. 1593, 1600–01 (2002).

25. Special Order 40, Los Angeles Police Department, <http://keepstuff.homestead.com/>

status in itself is not a matter for police action” and ordered that officers will neither initiate contact with the objective of determining immigration status nor arrest anyone for illegal entry if his illegal immigration status is revealed.²⁶ Special Order 40 remains in force today.

In the years that followed, other communities adopted similar policies that advanced a more political agenda. Violence and political unrest prompted a wave of immigrants from El Salvador and Guatemala to enter the United States in the 1980s.²⁷ Many activists blamed U.S. interventionism in Central America for forcing these immigrants from their homes, and were angered by the U.S. government’s unwillingness to offer refugee status to many of the Salvadoran and Guatemalan immigrants.²⁸ In protest against U.S. policy and out of humanitarian concern, churches and local civic groups spearheaded the sanctuary movement by offering Salvadoran and Guatemalan immigrants shelter, clothing, and food.²⁹ By the late 1980s, the movement had garnered the support of hundreds of religious congregations, and twenty-eight cities and two states had passed sanctuary resolutions or laws intended to inhibit local enforcement of immigration laws.³⁰

As the political unrest in Central America dissipated, the sanctuary movement remained largely dormant until the attacks of September 11, 2001.³¹ The attacks sparked intense nationalism and anti-immigration sentiment, but they also reinvigorated the sanctuary movement by forcing national security and immigration issues to the forefront of the national agenda.³² Some scholars have found the timing of the sanctuary movement’s resurgence surprising, given the expanded authority extended to law enforcement officers after September 11.³³ The decisions of many local officials to reject expanded authority in favor of sanctuary are not counterintuitive, however, given the controversy surrounding the federal government’s efforts to expand local

Spec40orig.html (last visited May 10, 2008).

26. *Id.*

27. Ari L. Goldman, *U.S. Clerics Debating Ethics of Giving Sanctuary to Aliens*, N.Y. TIMES, Aug. 23, 1985, at A1.

28. Maria Cristina Garcia, “Dangerous Times Call for Risky Responses:” *Latino Immigration and Sanctuary, 1981 – 2001*, in *LATINO RELIGIONS AND CIVIC ACTIVISM IN THE UNITED STATES* 159, 164 (Gaston Espinosa, Virgilio Elizondo & Jesse Miranda eds., 2005).

29. *Id.*

30. *Id.* at 169. See generally MIRIAM DAVIDSON, *CONVICTIONS OF THE HEART: JIM CORBETT AND THE SANCTUARY MOVEMENT* (1988).

31. Only five sanctuary policies were adopted in the 1990s. See SANCTUARY LAWS CHART, *supra* note 9.

32. See *id.*; see also Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1381 (2006) (discussing the impact of September 11, 2001 on the sanctuary movement) [hereinafter Pham II].

33. See David A. Harris, *The War on Terror, Local Police, and Immigration Enforcement: A Curious Tale of Police Power in Post-9/11 America*, 38 RUTGERS L.J. 1, 7 (2007). (“[I]n the central law enforcement battle of our time, we see state and local police doing something curiously unusual—saying ‘no, thank you’ to greater police power.”).

enforcement authority following September 11.³⁴

In 2002, the Department of Justice's ("DOJ") Office of Legal Counsel ("OLC") announced in a policy memorandum that local officials possess the "inherent authority" to arrest and detain illegal immigrants for both criminal *and* civil immigration violations.³⁵ This memorandum rescinded the policy advice offered in a 1996 memorandum, also from the OLC, which stated that local enforcement officials possess the authority to enforce only criminal violations. The new policy advanced in the 2002 memorandum drew intense criticisms from scholars and policymakers who questioned the constitutionality of local enforcement of civil immigration law.³⁶ In the two years following the DOJ's revision, more than twenty cities and towns adopted sanctuary policies.³⁷ The increasing popularity of sanctuary policies during this period suggests that like academics, local officials questioned the legality of the DOJ's position.³⁸ At the same time, other local officials feared the DOJ's expanded interpretation of local authority would prove too costly or complex and gravitated to sanctuary measures as a result.³⁹

Since the September 11 attacks and DOJ's 2002 memorandum, the sanctuary movement has sustained and increased its popularity; seven major cities and counties passed sanctuary policies in 2007 alone.⁴⁰ By April 2008, four states and almost seventy localities had adopted sanctuary policies.⁴¹ Alaska, Montana, New Mexico, and Oregon have all adopted statewide sanctuary measures.⁴² Major cities with sanctuary policies include New York, Los Angeles, Boston, Philadelphia, Chicago, San Francisco, Houston, and Seattle.⁴³

34. See Asli Ü Bâli, *Changes in Immigration Law and Practice after September 11: A Practitioner's Perspective*, 2 CARDOZO PUB. L. POL'Y & ETHICS J. 161, 170 (2003).

35. Memorandum from Jay S. Bybee, Assistant Att'y Gen., U.S. Dep't of Justice, Office of Legal Counsel for the Att'y Gen. on Non-Preemption of the Authority of State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations 2 (Apr. 3, 2002), *available at* <http://www.aclu.org/FilesPDFs/ACF27DA.pdf> [hereinafter 2002 DOJ Memo]. Notably, the Office of Legal Counsel only released the 2002 memorandum after the American Civil Liberties Union requested it under the Freedom of Information Act. The released version of the memorandum cited herein contains a number of redactions.

36. See, e.g., Pham I, *supra* note 13.

37. See SANCTUARY LAWS CHART, *supra* note 9.

38. See, e.g., Immigrant Rights Commission, S.F., Cal., Resolution # IRC-090902, *available at* http://www.sfgov.org/site/immigrant_page.asp?id=4973 (expressing disapproval with the federal government's "war against terrorism" and accusing federal immigration enforcement efforts of "discrimination and terror").

39. See, e.g., H.R.J. Res. 22, 23rd Leg., 1st Sess. (Alaska 2003) (stating that state agencies may not "use state resources or institutions for the enforcement of federal immigration matters, which are the responsibility of the federal government").

40. Cities and counties that passed sanctuary policies in 2007 included Oakland, Richmond, and Santa Cruz, California; Cook County, Illinois; Detroit, Michigan; Minneapolis, Minnesota; and Albuquerque, New Mexico. SANCTUARY LAWS CHART, *supra* note 9.

41. *Id.*

42. *Id.*

43. *Id.*

Immigration law scholar Orde Kittrie characterizes modern sanctuary policies in these cities and states as of three types: (1) “don’t ask” policies that limit inquiries related to nationality or immigration status; (2) “don’t enforce” policies that limit immigration-related arrests or detentions; and (3) “don’t tell” policies that limit what information local enforcement officers may share with federal officials.⁴⁴ As Kittrie points out, many sanctuary policies contain some combination of these three structures.⁴⁵

Despite the conceptually useful framework of “don’t ask,” “don’t enforce,” and “don’t tell,” sanctuary policies within each of these categories can vary greatly in breadth. For example, the Takoma Park, Maryland, “don’t enforce” policy offers a broad vision of sanctuary by directing officers to enforce neither civil nor criminal immigration violations.⁴⁶ San Francisco maintains a “don’t enforce” policy as well, but the policy excludes felony offenders; San Francisco police officers are not constrained in their ability to enforce immigration laws against illegal immigrants with past felony convictions.⁴⁷ At times, limitations on local enforcement powers may vary so much that people disagree over whether or not a city’s laws or policies offer sanctuary at all.⁴⁸

C. Preexisting Challenges to Sanctuary Policies

A number of factors curtail the effectiveness of the sanctuary movement wholly apart from the inclusion of immigration data in the NCIC. Federal and state restrictions as well as logistical hurdles can weaken sanctuary policies. Policymakers must be mindful of these preexisting impediments as they work to mitigate the harmful effects of the NCIC on sanctuary policies. The more that reforms respond to both these challenges and the issues raised by the NCIC, the more effective they will be in guaranteeing sanctuary.

In 1996, Congress passed two laws intended to undercut the structural integrity of local government sanctuary policies: the Personal Responsibility

44. Kittrie, *supra* note 12, at 1455.

45. *Id.*

46. TAKOMA PARK, MD., CITY CODE § 9.04 (2007); *see also* Steve Hendrix, *Council Votes to Stay an Immigrant ‘Sanctuary,’* WASH. POST, Oct. 30, 2007, at B5.

47. S.F., CAL., ADMIN. CODE § 12H.2-1 (1993). The San Francisco Administrative Code once included a “don’t enforce” provision protecting all immigrants. However, the City Council voted to exclude convicted felons from the policy when political pressure threatened the viability of the city’s sanctuary policy in the early 1990s. In order to maintain the sanctuary policy, immigration rights activists on the City Council were forced to compromise and create an exception for felony offenders. Telephone Interview with Sheila Chung Hagen, Immigrant Rights Administrator, City of San Francisco (Apr. 9, 2008) [hereinafter Hagen Interview].

48. *See supra* note 9 for a discussion of the variability of sanctuary policies; *see also* FactCheck.org, *The Sanctuary Spat*, http://www.factcheck.org/the_sanctuary_spat.html (last visited May 20, 2008) (analyzing the dispute between Republican presidential primary contenders Rudolph Giuliani and Mitt Romney over the status of New York City as a sanctuary city).

and Work Opportunity Reconciliation Act of 1996 ("Welfare Reform Act")⁴⁹ and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("Immigration Reform Act").⁵⁰ Section 434 of the Welfare Reform Act and Section 642 of the Immigration Reform Act state that, "notwithstanding any other provision of Federal, State, or local law," no state or local entity may be prohibited or restricted from reporting information to federal authorities.⁵¹ By expressly prohibiting restraints on communications with federal officials, the 1996 laws targeted "don't tell" measures that banned local cooperation with federal authorities.⁵² When New York City challenged the constitutionality of Sections 434 and 642, the Second Circuit upheld the statutes and nullified New York City's Executive Order 124, which, in many cases, prohibited local officials from providing federal authorities with immigration status information.⁵³

As a result of Sections 434 and 642, the sanctuary movement is currently vulnerable to attacks on the validity of "don't tell" measures. Scholars have tagged "don't tell" measures as "obvious targets for express preemption" given the apparent conflict between "don't tell" policies and the restrictions in Sections 434 and 642.⁵⁴ Somewhat paradoxically, however, "don't tell" measures remain in place in many cities in spite of Sections 434 and 642 and the Second Circuit's decision to nullify New York City's Executive Order 124.⁵⁵ This structure of sanctuary policy probably remains popular simply

49. Pub. L. No. 104-193, 110 Stat. 2105 (1996).

50. Pub. L. No. 104-208, Division C, 110 Stat. 3009, 546 (1996). In addition, the Immigration Reform Act separately included a section amending the Immigration and Nationality Act to allow written agreements between local and federal authorities deputizing local enforcement officers with federal enforcement authority over immigration matters. Known as Section 287(g) authority, these written agreements usually provide for federal-level training for local enforcement officers and allow these trained officers to file immigration violation charges. See Immigration Reform Act, Pub. L. No. 104-208, §§ 1(a), 133, 110 Stat. 3009-546, 3009-563 (codified as amended in scattered sections of 8 U.S.C.); Kobach, *supra* note 13, at 196 - 199.

51. Pub. L. No. 104-193, 110 Stat. 2105 (1996) and Pub. L. No. 104-208, Division C, 110 Stat. 3009, 546 (1996).

52. The Conference Report accompanying the Welfare Reform Act states that the law intends "to give State and local officials the authority to communicate with the INS regarding the presence, whereabouts, or activities of illegal aliens. . . . The conferees believe that immigration law enforcement is as high a priority as other aspects of Federal law enforcement, and that illegal aliens do not have the right to remain in the United States undetected and unapprehended." H.R. Rep. No. 104-725, at 383 (1996) (Conf. Rep.), as reprinted in 1996 U.S.C.A.N. 2649, 2771.

53. *City of New York v. United States*, 179 F.3d 29, 35 (2d Cir. 1999) (characterizing New York City's policy as an effort "to turn the Tenth Amendment's shield against the federal government's using state and local governments to enact and administer federal programs into a sword allowing states and localities to engage in passive resistance that frustrates federal programs").

54. Pham II, *supra* note 32, at 1376 (providing a detailed preemption analysis); see also Kittrie, *supra* note 12.

55. Cities with "don't tell" provisions still in place include San Francisco, Chicago and Philadelphia. Even New York City has an executive order in place purporting to restrict the ability of local officers to communicate immigration-related information. See SANCTUARY LAWS CHART, *supra* note 9.

because federal officials and other litigants have not filed lawsuits challenging “don’t tell” measures on preemption grounds; with no apparent threat of litigation, cities have had little incentive to revise their policies. Yet, Sections 434 and 642 unquestionably weakened the effectiveness and longstanding viability of “don’t tell” measures because local officials have only limited, if any, capacity to enforce “don’t tell” measures in light of these federal regulations.⁵⁶ Notably, however, even if “don’t tell” measures ultimately prove unenforceable, the other broad categories of sanctuary policies—“don’t ask” and “don’t enforce”—currently face little threat of federal preemption.⁵⁷

In addition to federal legislation that may weaken sanctuary policies, recent state developments have limited the trajectory of the sanctuary movement. Where a state has restricted sanctuary policies after legitimate democratic processes, such limitations pose little threat to the sanctuary movement as a whole because the underlying premise of the sanctuary movement is that local enforcement of immigration law should occur, or not, when a community so decides. Thus far, only a handful of states have moved to impede local sanctuary policies. Colorado law expressly prohibits local government agencies within the state from enacting sanctuary policies that forbid communication with federal authorities about immigration violations.⁵⁸ Minnesota limits sanctuary policies by way of an executive order that requires local officers to cooperate with federal officials in the enforcement of immigration law.⁵⁹ Similarly, in an effort to make the state inhospitable to illegal immigrants, Oklahoma passed a law specifically authorizing local enforcement officers to check the immigration status of anyone they contact.⁶⁰ Other states, including Maryland and California, are considering state-wide measures that would restrict sanctuary policies by conditioning the receipt of state funding on local enforcement of immigration laws. These measures have languished at the committee stage and show no signs of gaining the necessary support to pass.⁶¹

When local communities disagree with state-level decisions, they may still have some flexibility to enact sanctuary policies. Despite the Colorado restriction on sanctuary policies, Durango, Colorado, discourages local

56. See *City of New York*, 179 F.3d at 36 (suggesting that “don’t tell” measures could be valid in spite of Sections 434 and 642 if a local government prohibits the dissemination of confidential information generally, and not only to specific persons or agencies).

57. Kittrie, *supra* note 12.

58. COLO. REV. STAT. § 29-29-101 (2006).

59. Press Release, Minn. Off. of the Governor, Governor Pawlenty Signs Executive Order Directing Cooperation with Federal Immigration Authorities (Jan. 7, 2008), available at <http://www.governor.state.mn.us/priorities/governorsorders/executiveorders/PROD008599.html>.

60. Ismael Estrada & Keith Oppenheim, *Oklahoma Targets Illegal Immigrants with Tough New Law*, CNN, Nov. 5, 2007, <http://www.cnn.com/2007/US/11/02/oklahoma.immigration/>.

61. H.B. 885, 2008 Leg., 425th Sess. (Md. 2008) (conditioning funding to localities on willingness to enforce immigration laws); A.B. 2601, 2008 Leg. (Cal. 2008) (withholding local receipt of vehicle registration funds from cities with sanctuary policies).

enforcement of immigration law. By a resolution of the city council, Durango forbids local officers from using local funds or resources in the enforcement of immigration law unless they suspect criminal activity.⁶² By restricting the use of local funds and resources, Durango imposes a logistical hurdle that may reduce local immigration enforcement.

Finally, sanctuary policies are limited in practice by knowledge gaps and local confusion. Kittrie criticizes the effectiveness of sanctuary policies by noting that they are generally poorly publicized and exceptionally varied.⁶³ The result, Kittrie argues, is that immigrants may be ignorant of the policies altogether, or too unsure of the policies' import to risk contact with local law enforcement.⁶⁴ Contact with local authorities remains risky because if immigrants are unaware of a local sanctuary policy, they have every reason to believe that any type of interaction with a local authority could result in deportation. Noting these information-related impediments, immigration law scholar Rick Su notes that local efforts to restrict immigration enforcement are often "dismissed as vain attempts to address an issue that can only be resolved by comprehensive legislation at the federal level."⁶⁵

Communities likely face great difficulty in determining if local sanctuary policies operate effectively. Measuring whether illegal immigrants understand a local sanctuary policy is necessarily fraught with difficulty, not least because local officials do not know which residents are illegal immigrants. Once officials recognize that a problem may exist, however, they can confront practical questions about effectiveness through public outreach campaigns. In Austin, Texas, police officials successfully used a marketing campaign to increase the community's understanding of the local sanctuary policy; both victim and witness reporting increased following the campaign.⁶⁶ San Francisco adopted a city-wide campaign similarly intended to educate residents about the specifics of the local sanctuary policy.⁶⁷

The remainder of this Comment explores how the NCIC presents a new type of challenge that differs from the federal and state restrictions examined in this section. Unlike federal or state restrictions, the NCIC threatens all three forms of sanctuary policies at once—"don't ask," "don't tell" and "don't enforce." Further, unlike state restrictions, the NCIC impacts communities that *want* to provide sanctuary for illegal immigrants. Instead, like practical

62. Durango, Colo., City Council Resolution No. 2004-40 (July 6, 2004); see SANCTUARY LAWS CHART, *supra* note 9.

63. Kittrie, *supra* note 12, at 1482-84.

64. *Id.*

65. Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619, 1623 (2008).

66. Harris, *supra* note 33, at 44 (discussing success of Austin's public outreach campaign).

67. In San Francisco, the \$83,000 outreach campaign included billboards and brochures in English, Spanish, Chinese, Vietnamese, and Russian. Cecilia M. Vega, *City Making Clear Illegals Can Obtain Services Here*, S.F. CHRON., Apr. 3, 2008, at B1.

concerns about local ignorance, the NCIC is especially harmful because local officials may not even recognize the threat.

II

THE PURPOSES AND BENEFITS OF SANCTUARY POLICIES

The threats posed to sanctuary cities by the availability of immigration information through the NCIC are relevant only if sanctuary policies are worthy of protection. Adopted by almost seventy localities, including most of the nation's largest, sanctuary policies are clearly popular.⁶⁸ However, popularity alone does not measure a policy's just or beneficial nature.

Apart from popular appeal, at least eight philosophical and practical motivations explain the rationales of the modern sanctuary movement. Sanctuary policy advocates are motivated by a desire to (1) encourage community cooperation;⁶⁹ (2) prevent racial profiling;⁷⁰ (3) express disapproval with federal immigration policies;⁷¹ and (4) maintain local control over social policies and local police activity.⁷² Additionally, sanctuary policies address (5)

68. See SANCTUARY LAWS CHART, *supra* note 9.

69. See INT'L ASS'N OF CHIEFS OF POLICE, ENFORCING IMMIGRATION LAW: THE ROLE OF STATE, TRIBAL, AND LOCAL LAW ENFORCEMENT 1, available at <http://www.theiacp.org/documents/pdfs/Publications/ImmigrationEnforcementconf%2Epdf> [hereinafter INT'L ASS'N OF CHIEFS OF POLICE POSITION PAPER]; MAJOR CITIES CHIEFS, M.C.C. IMMIGRATION COMMITTEE RECOMMENDATIONS FOR ENFORCEMENT OF IMMIGRATION LAWS BY LOCAL POLICE AGENCIES 8 (2006), available at http://www.houstontx.gov/police/pdfs/mcc_position.pdf (expressing concern that local enforcement of immigration laws could encourage officers to use racial profiling tactics) [hereinafter MAJOR CITIES CHIEFS POSITION PAPER].

70. See HANNAH GLADSTEIN, ANNIE LAI, JENNIFER WAGNER, & MICHAEL WISHNIE, MIGRATION POLICY INST., *BLURRING THE LINES: A PROFILE OF STATE AND LOCAL POLICE ENFORCEMENT OF IMMIGRATION LAW USING THE NATIONAL CRIME INFORMATION CENTER DATABASE, 2002-2004* 6 (2005), available at http://www.migrationpolicy.org/pubs/MPI_report_Blurring_the_Lines_120805.pdf (citing 8 U.S.C. § 1252c); see also MAJOR CITIES CHIEFS POSITION PAPER, *supra* note 69.

71. See, e.g., Immigrant Rights Commission, S.F., Cal., Resolution # IRC-090902, *supra* note 38 (expressing disapproval with the federal government's "war against terrorism" and accusing federal immigration enforcement efforts of "discrimination and terror"); Hendrix, *supra* note 46 (describing local support for the sanctuary policy in Takoma Park, Md. and quoting resident Jenny Hughes as saying that Takoma Park "is a sanctuary for me against what is going on in this country . . . I have always been proud of the fact that our city is a place where I can feel not just physically safe but politically safe.").

72. The "states as laboratories" philosophy encourages states and cities to craft and experiment with social legislation on the local level. See, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."). In terms of the sanctuary movement, the states as laboratories approach suggests that variables on the local level—including the size of the local police force and the number of immigrant residents—must be considered in policymaking. The International Association of the Chiefs of Police emphasizes the importance of local control by characterizing local law enforcement participation in immigration enforcement as "an inherently local decision that must be made by a police chief, working with their elected officials, community leaders and citizens." INT'L ASS'N OF CHIEFS OF POLICE POSITION PAPER, *supra* note 69, at 1.

fiscal concerns related to the costs of enforcing immigration laws;⁷³ (6) logistical concerns related to the necessary training and protocol for local enforcement officers to enforce an unfamiliar area of the law;⁷⁴ (7) potential civil liability;⁷⁵ and (8) questions of constitutional authority.⁷⁶ This section will discuss in more detail the goal of encouraging community cooperation with local enforcement officers—arguably the most significant of the many motivations for sanctuary policies—as well as the legal right of communities to adopt policies that reflect these motivations.

A. Encouraging Community Cooperation

Of the many motivations for sanctuary policies, the goal of encouraging community cooperation enjoys the strongest empirical evidence and anecdotal support. Police departments have found that encouraging community cooperation justifies local officers' decisions not to enforce federal immigration law. Many local political officials and enforcement officers believe that sanctuary policies enhance relations between immigrant communities and law enforcement officers by quelling immigrants' fears that crime reporting or other interactions with police officials will result in deportation.⁷⁷ These officials have determined that local immigration enforcement has a chilling effect on crime reporting and instills a general fear of law enforcement in immigrant communities.⁷⁸

A wide range of authorities concur that immigrant communities tend to fear contact with law enforcement. President George W. Bush cautioned that illegal immigrants "who seek only to earn a living end up in the shadows of American life—fearful, often abused and exploited. When they are victimized by crime, they are afraid to call the police, or seek recourse in the legal system."⁷⁹ The International Association of Chiefs of Police ("IACP") also

73. See, e.g., H.R.J. Res. 22, 23rd Leg., 1st Sess. (Alaska 2003) (stating that state agencies may not "use state resources or institutions for the enforcement of federal immigration matters, which are the responsibility of the federal government").

74. INT'L ASS'N OF CHIEFS OF POLICE POSITION PAPER, *supra* note 69, at 5 (discussing the increasing complexity of federal immigration law and the group's position that proper enforcement would require specialized knowledge of immigration law); see also Charlie LeDuff, *Police Say Immigrant Policy is Hindrance*, N.Y. TIMES, Apr. 7, 2005, at A16 (quoting the former Los Angeles Police Commissioner Silvia Saucedo as saying, "We're stretched so thin, it's impossible to have the L.A.P.D. trained in federal procedures.").

75. INT'L ASS'N OF CHIEFS OF POLICE POSITION PAPER, *supra* note 69, at 4 (discussing civil lawsuits filed by U.S. citizens and legal residents mistakenly detained in a local police raid for illegal immigrants).

76. See, e.g., Pham II, *supra* note 32 (arguing that local officers lack the constitutional authority to enforce immigration law).

77. See, e.g., INT'L ASS'N OF CHIEFS OF POLICE POSITION PAPER, *supra* note 69.

78. *Id.*

79. George W. Bush, Pres. of U.S., New Temporary Worker Program: Remarks on Immigration Policy (Jan. 7, 2004), available at <http://www.whitehouse.gov/news/releases/2004/01/20040107-3.html>.

recognizes that immigrants avoid police contact.⁸⁰ The IACP suggested that immigrants' fears of the police may be most pronounced in situations of domestic violence, because fear of deportation may prompt women not to report abuse.⁸¹

Although some public officials continue to express skepticism about whether sanctuary policies can improve community relations,⁸² sanctuary advocates have amassed a persuasive spectrum of studies that empirically support the community cooperation theory.⁸³ For example, criminal law scholar David Harris accounts how police and immigrant partnerships in Austin, Texas produced dramatic results.⁸⁴ The police in Austin worked with immigrant communities and created a marketing campaign informing immigrants that the police wanted community help in decreasing the crime rate. The campaign emphasized that the police would not ask victims or witnesses any immigration-related questions.⁸⁵ Harris found that victim and witness reporting increased as a result of the marketing campaign.⁸⁶ More importantly, his

80. INT'L ASS'N OF CHIEFS OF POLICE POSITION PAPER, *supra* note 69, at 5.

81. *Id.*

82. Some federal officials, including Senator Jeff Sessions, Republican of Alabama, and former DOJ lawyer Kris W. Kobach, have characterized the cooperation theory as a "myth" and challenged the utility of sanctuary policies in improving crime reporting and community safety. Jeff Sessions & Cynthia Hayden, *The Growing Role for State & Local Law Enforcement in the Realm of Immigration Law*, 16 STAN. L. & POL'Y REV. 323, 338-39 (2005); *State and Local Authority to Enforce Immigration Law: Evaluating a Unified Approach for Stopping Terrorists: Hearing Before the Subcomm. on Immigration, Border Security, and Citizenship of the S. Comm. on the Judiciary*, 108th Cong. 19 (2004) (testimony of Professor Kris Kobach).

83. See, e.g., Mary Ann Dutton, Leslye E. Orloff & Giselle Aguilar Hass, *Characteristics of Help-Seeking Behaviors, Resources, and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL'Y 245, 292-95 (2000) (detailing the fact that abusers of illegally present Latinas often threaten to have their victims deported if they seek help); Juliet V. Casey, *Police Pilot Program: Hart Discourages Silence*, LAS VEGAS REV. J., Sept. 30, 2001, at 1B (describing a police outreach program to immigrant communities in Las Vegas wherein an officer began a workshop by asking if anyone would contact the police if their neighbor demanded \$200 a week not to report the person to immigration authorities; no one in the room indicated that they would seek help from local authorities as a result of such extortion); CHIRAG MEHTA ET AL., CTR. FOR URBAN ECON. DEV., UNIV. OF ILL. AT CHI., WORKPLACE SAFETY IN ATLANTA'S CONSTRUCTION INDUSTRY: INSTITUTIONAL FAILURE IN TEMPORARY STAFFING ARRANGEMENTS 31 (2003), available at <http://www.uic.edu/cuppa/uicued/publications/recent/atlantareport.pdf> ("[T]he undocumented immigrants surveyed explained that their lack of legal status . . . makes it more risky to protest unsafe conditions or seek compensation for on-the-job injuries."); CHIRAG MEHTA ET AL., CTR. FOR URBAN ECON. DEV., UNIV. OF ILL. AT CHI., CHICAGO'S UNDOCUMENTED IMMIGRANTS: AN ANALYSIS OF WAGES, WORKING CONDITIONS, AND ECONOMIC CONTRIBUTIONS 28 (2002), available at http://www.uic.edu/cuppa/uicued/publications/recent/undoc_full.pdf (finding that "the fear that workers might be deported if they report the conditions" prevented illegal workers from reporting unsafe working conditions to OSHA).

84. Harris, *supra* note 33, at 44; see also DAVID A. HARRIS, GOOD COPS: THE CASE FOR PREVENTIVE POLICING (2005).

85. Harris, *supra* note 33, at 44 (finding that "nearly all categories of criminal victimization dropped, and stayed lower.").

86. *Id.*

research found that the crime levels in Austin fell and remained lower following the outreach efforts.⁸⁷

The preferences of local law enforcement officers also suggest that law enforcement officers do not consider the cooperation theory a myth or the results achieved in Austin as an aberration. An internal LAPD report found that LAPD officers believed there was “a marked difference in the attitude of the immigrant community respecting the LAPD since Special Order 40 was issued.”⁸⁸ Umbrella organizations of law enforcement leaders, including the Major Cities Chiefs and the IACP, emphasize the importance of cooperation and open communication with immigrant communities.⁸⁹ The Major Cities Chiefs released a position paper expressing its opposition to any federal measures that would compel the participation of local enforcement officials.⁹⁰ The organization stressed that local enforcement of immigration law would “undermine the level of trust and cooperation between local police and immigrant communities” and “result in increased crime.”⁹¹

Local enforcement officers have spoken of the benefits of open communication with immigrant communities and the negative consequences that local enforcement of immigration law could have on this relationship. San Francisco Police Chief Heather Fong expressed her support for San Francisco’s sanctuary policy, explaining, “[o]ften times we have seen that individuals who do not speak the English language or individuals who do not feel that they can report, they are being preyed upon by members of their own community and that’s not acceptable.”⁹² A former chief of the Sacramento Police Department stated that “to get into the enforcement of immigration laws would build wedges and walls [between the police and the community] that have taken a long time to break down.”⁹³ The Tucson Police Department Chief explained, “[w]e have worked hard to build bridges and establish partnerships with the diverse population of our city. I believe that taking on [immigration enforcement] would jeopardize those relationships and create unneeded tension

87. *Id.*

88. RAMPART INDEPENDENT REVIEW PANEL, A REPORT TO THE LOS ANGELES BOARD OF POLICE COMMISSIONERS CONCERNING SPECIAL ORDER 40, at 8 (Feb. 1, 2001), *available at* http://lacity.org/oig/Special_Order_40_708061_v1.pdf

89. INT’L ASS’N OF CHIEFS OF POLICE POSITION PAPER, *supra* note 69, at 1; MAJOR CITIES CHIEFS POSITION PAPER, *supra* note 69. The positions of such groups are not insignificant; the National Crime Information Center 2000 Operating Manual notes that “the structure and basic procedures of the NCIC System were approved by resolution of the full membership of the International Association of Chiefs of Police” in 1996. NAT’L CRIME INFO. CTR., 2000 OPERATING MANUAL § 1.1, *available at* [https://olets-info.olets.state.ok.us/cjismanuals/pdf/hereinafter NCIC 2000 OPERATING MANUAL](https://olets-info.olets.state.ok.us/cjismanuals/pdf/hereinafter%20NCIC%202000%20OPERATING%20MANUAL)].

90. MAJOR CITIES CHIEFS POSITION PAPER, *supra* note 69, at 6.

91. *Id.*

92. Heather Ishimaru, *San Francisco Reaffirms Immigration “Sanctuary” Status*, ABC NEWS, Apr. 20, 2007, <http://abclocal.go.com/kgo/story?section=news/local&id=5230622>.

93. Eric Schmitt, *Administration Split on Local Role in Terror Fight*, N.Y. TIMES, Apr. 29, 2002, at A1.

in our community.”⁹⁴

Encouraging the trust of immigrant populations may have additional benefits beyond decreasing a city's crime rate. If sanctuary policies influence residency decisions, sanctuary cities could enjoy the economic and social benefits associated with high immigrant populations. A study examining the country's eighty-five most populous cities found that large immigrant populations are associated with higher per capita incomes, faster increases in per capita income, lower poverty rates, and lower tax burdens, among other benefits.⁹⁵ While this data is only correlative and not causal, immigrants may also increase community stability, as populations with a greater percentage of immigrants tend to have higher rates of self-employment and entrepreneurship.⁹⁶ As a result of these and other factors, immigration scholar Thomas Muller argues that “immigration by itself has sparked more neighborhood revitalization and commercial activity than even the most successful case of government intervention.”⁹⁷

B. Allowing Local Enforcement Officers to Exercise Discretion

The question remains why local enforcement officials' interest in encouraging community cooperation sufficiently justifies protecting sanctuary policies at a time when the federal government aims to increase local participation in immigration enforcement. Part of the federal government's role is to harmonize policies on a national scale. Federal preemption is especially relevant in the field of immigration, where policies can influence international relations and other areas of national concern. Nevertheless, local enforcement officials' interest in encouraging community cooperation trumps these federal concerns, because no federal authority—Constitutional, statutory or judicial—mandates local enforcement of federal immigration laws.⁹⁸ As a result, the longstanding tradition of police discretion weighs heavily in favor of supporting local decisions to adopt sanctuary policies.

The Supreme Court recently stressed the importance of allowing local enforcement officers discretion over how and when to enforce the law.⁹⁹ In

94. Tim Steller, *Expansion of Foreigner Arrest Plan is Feared*, ARIZ. DAILY STAR (Tucson, Ariz.), July 12, 2002, at A1.

95. STEPHEN MOORE, HOOVER INST., IMMIGRATION AND THE RISE AND DECLINE OF AMERICAN CITIES 29 (1997).

96. See Rick Su, *The Immigrant City* (Sept. 4, 2006) (unpublished article, on file with author).

97. THOMAS MULLER, IMMIGRANTS AND THE AMERICAN CITY 304 (1993).

98. *But see* City of New York v. United States, 179 F.3d 29, 35 (2d Cir. 1999) (raising refusal by local authorities to cooperate with desegregation as ordered in *Brown v. Board of Education*, 347 U.S. 483 (1954), as an uncomfortable analogy to New York City's sanctuary measure). The difference, significantly, between resistance to desegregation and resistance to local enforcement of immigration is that federal law does not mandate immigration enforcement by local authorities.

99. *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005).

Town of Castle Rock v. Gonzales, the Court held that the respondent, Jessica Gonzales, did not have a right under the Due Process Clause to have the police enforce a restraining order against her husband.¹⁰⁰ The restraining order stated in a notice to law enforcement officers that “YOU SHALL USE EVERY REASONABLE MEANS TO ENFORCE THIS RESTRAINING ORDER.”¹⁰¹ Although this language appeared to mandate enforcement, the Supreme Court held by a 7-2 margin that a “well established tradition of police discretion” militated against requiring local enforcement officers to act.¹⁰² Quoting the American Bar Association’s Standards for Criminal Justice, the Court noted that “statutes that, by their terms, seem to preclude nonenforcement by the police . . . clearly do not mean that a police officer may not lawfully decline to . . . make an arrest.”¹⁰³ The Court’s unambiguous language, even in a case that involved a *mandatory* enforcement clause, strongly suggests that officers have the discretion to refrain from enforcing immigration laws. Unlike the restraining order at issue in *Town of Castle Rock*, immigration statutes largely do not contemplate, much less mandate, enforcement at the local level.¹⁰⁴

Given the legitimate reasons that local authorities might have to limit the role of local officers in immigration enforcement, as well as their legal right to do so, the input of immigration violations records into the NCIC presents serious challenges to sanctuary policies, and to effective local policing.

III

THE THREAT OF THE NCIC

The inclusion of immigration records in the NCIC database poses a unique threat to sanctuary policies precisely because of the NCIC’s role as a preeminent law enforcement tool. The NCIC, which catalogues arrest warrants, wanted persons, missing property, and other law enforcement records, is accessed millions of times each day by state and local enforcement officials.¹⁰⁵ As a result of federal efforts to develop and expand the NCIC’s catalog of immigration records, each of the millions of times that officers access the NCIC, for whatever purpose, they may learn information about a queried person’s suspected immigration violations. As this section explains, by presenting this information automatically, the NCIC undermines the inherent, and important, discretion that local law enforcement exercises, particularly regarding whether and how to enforce immigration law.

100. *Id.* at 748.

101. *Id.* at 752.

102. *Id.* at 760.

103. *Id.* at 760-61 (citing 1 ABA Standards for Criminal Justice 1-4.5, commentary, pp. 1-124 to 1-125 (2d ed. 1980) (footnotes omitted)).

104. *See supra* text accompanying notes 49-57.

105. Telephone Interview with Roy Weise, Senior Criminal Justice Info. Servs. Advisor, Fed. Bureau of Investigation (Apr. 9, 2008) [hereinafter Weise Interview].

A. NCIC Background

The NCIC is a highly advanced, computerized database intended to foster information sharing between law enforcement agencies. With roots in a pre-1900 system of law enforcement information sharing, the NCIC has grown into an enormous, highly used resource.

Local law enforcement agencies have long recognized that shared information improves knowledge and effectiveness at the local level. The predecessor to the NCIC dates back to the 1800s, when local law enforcement agencies shared information through a program organized by the International Association of Chiefs of Police ("IACP").¹⁰⁶ In the early 1900s, the federal government took control of the IACP program and placed the FBI in charge of maintaining a national catalog of fingerprints and rap sheets that local law enforcement agencies could access.¹⁰⁷

Congress first legislatively authorized efforts to maintain a federal criminal information database in 1930 and authority for the current NCIC stems from this legislative enactment.¹⁰⁸ Since the 1960s, Congress has repeatedly expanded the types of criminal records that can be entered into the NCIC.¹⁰⁹

The current NCIC—known as the NCIC 2000 after a technical update in the late 1990s—contains information entered by federal, state and local officers organized into eighteen different categories of files.¹¹⁰ Accessible in stationhouses as well as in patrol cars, the NCIC processes more than six million information requests per day from more than 90,000 law enforcement agencies.¹¹¹ As the NCIC's wealth of data has expanded, there has been a concomitant and steady rise in annual information requests.¹¹² NCIC users can search by identifiers such as names, birthdays, and license plate numbers. The

106. McDONALD, *supra* note 15, at 2.

107. The Ctr. for Democracy & Tech., A Briefing on Public Policy Issues Affecting Civil Liberties Online (Oct. 25, 2002), http://www.cdt.org/publications/pp_8.22.shtml (noting that now, however, the rap sheet and fingerprint databases are distinct: the NCIC is separate from the Integrated Automated Fingerprint Identification System, more commonly known as IAFIS. The FBI maintains both databases).

108. Information Letter from Criminal Justice Info. Ctr. Div., Fed. Bureau of Investigation (Apr. 6, 2001), *available at* www.doj.state.wi.us/les/law/docs/20010406_infoletter1.doc. The statute authorizing the NCIC was originally at 5 U.S.C. § 340. Revised and renumbered in the 1960s, 5 U.S.C. § 340 is now 28 U.S.C. § 534.

109. *See* 28 U.S.C. § 534 (2006).

110. NCIC 2000 OPERATING MANUAL, *supra* note 89. The categories of NCIC files are: seven property files containing records for articles, boats, guns, license plates, securities, vehicles, and vehicle and boat parts; and eleven persons files including the Convicted Sexual Offender Registry, Foreign Fugitive, Identity Theft, Immigration Violator, Missing Person, Protection Order, Supervised Release, Unidentified Person, U.S. Secret Service Protective, Violent Gang and Terrorist Organization, and Wanted Person Files.

111. Weise Interview, *supra* note 105; *see also* National Crime Information Center Celebrates 40th Birthday, GOVERNMENT TECHNOLOGY, Jan. 22, 2007, *available at* <http://www.govtech.com/gt/articles/103437>.

112. Weise Interview, *supra* note 105.

database also stores digital images that can be retrieved by inquiring officers.¹¹³

Law enforcement officers use the NCIC by entering known information and checking to see if the database reports any “hits” matching that information to data contained in the wanted persons or property files. Officers run NCIC checks during virtually every interaction with the public.¹¹⁴ The government estimates that the NCIC produces a wanted person “hit” every ninety seconds.¹¹⁵ Notably, a hit is not probable cause for an officer to make an arrest.¹¹⁶ Instead, a hit creates only probable cause to detain a person for the time necessary for an officer to verify that the information contained in the NCIC is accurate.¹¹⁷ The NCIC directs officers to contact the enforcement agency that entered the information that prompted the hit in order to share information and verify that the warrant that prompted the hit remains outstanding.¹¹⁸ The DOJ lauds this process and regards the NCIC as “the nation’s principal law enforcement automated information sharing tool.”¹¹⁹

B. The Immigration Violator File

Once a registry limited to information regarding felony offenses, the NCIC now includes a growing amount of immigration information.¹²⁰ Immigration records only appeared in the NCIC beginning in 1996 when Congress authorized the entry of criminal immigration records into the NCIC.¹²¹ This input of data related to criminal immigration violations coincided with a legislative push to criminalize an increasing number of immigration violations.¹²² Then, in late 2001, the INS Commissioner announced that the INS would begin to enter records of *civil* immigration violations—more minor offenses, such as overstaying a visa—into the NCIC, although Congress had not authorized this expansion.¹²³ In 2002, Attorney

113. *National Crime Information Center Celebrates 40th Birthday*, *supra* note 111.

114. Weise Interview, *supra* note 105.

115. *Id.*

116. NCIC 2000 OPERATING MANUAL, *supra* note 89.

117. *Id.*

118. *Id.*

119. Prepared Statement from Alice Fisher, U.S. Deputy Assistant Att’y Gen., to the Subcomm. on Tech., Terrorism, and Gov’t Info of the Senate Comm. on the Judiciary (2001).

120. Wishnie, *supra* note 13, at 1096; *see also* Executive Memorandum from James Jay Carafano, Senior Research Fellow, The Heritage Foundation, *No Need for the CLEAR ACT: Building Capacity for Immigration Counterterrorism Investigations*, (Apr. 21, 2004), <http://www.heritage.org/Research/HomelandSecurity/em925.cfm>.

121. GLADSTEIN ET AL., *supra* note 70.

122. *See* Stumpf, *supra* note 6, at 376 (explaining that “criminal law is poised to swallow immigration law” and that the increasing criminalization of immigration violations has “created parallel systems in which immigration law and the criminal justice system are merely nominally separate.”).

123. *Hearing before the H. Comm. on Government Reform, Subcomm. on Criminal Justice, Drug Policy and Human Resources*, 107th Cong. (2001) (Statement of James W. Ziglar, Commissioner, Immigration and Naturalization Service) (notifying Congress that the INS would enter “absconder” records into NCIC).

General John Ashcroft announced that the DOJ would enter additional types of civil immigration records related to an expanded immigrant-tracking program into the NCIC.¹²⁴ In announcing this expansion, Ashcroft stated that “[t]he Department of Justice has no plans to seek additional support from state and local law enforcement in enforcing our nation’s [sic] immigration laws, beyond our narrow anti-terrorism mission.”¹²⁵ Despite this purportedly narrow task, the Department of Homeland Security (“DHS”) later announced plans to add records of student visa violators into the NCIC.¹²⁶

Hundreds of thousands of immigration records are now on file in the NCIC since this expansion. ICE reports that over 250,000 immigration-related records are available through the NCIC.¹²⁷ The actual number of these records is likely higher, given that, in 2003, a federal immigration official estimated that over 300,000 immigration-related records were on file in the database.¹²⁸ In some areas, the increasing availability of this information through the NCIC has had an immediate and drastic impact. In one Colorado city, for example, immigration-related arrests increased 500 percent after the DOJ began entering immigration records into the NCIC.¹²⁹

All of the records related to immigration violations are contained in one file in the NCIC: the Immigration Violator File.¹³⁰ Federal officials make all entries into the file, and only DHS and ICE can edit it.¹³¹ Significantly,

124. Ashcroft, *supra* note 8 (announcing the creation of the National Security Entrance and Exit Registration System).

125. *Id.*

126. Dan Eggen, *U.S. Considers Expanding FBI Database*, TECHNEWS, Dec. 17, 2003 (discussing the possible expansion of the FBI database to include the names of noncriminal deportees and student visa violators). Despite DHS’s announced plan to include records on student visa violations in the NCIC, this information has not yet been entered; see NCIC 2000 OPERATING MANUAL, *supra* note 89 (describing the contents of the NCIC Immigration Violator’s File).

127. LESC Fact Sheet, *supra* note 2. In addition, the NCIC interface provides local enforcement officers the option to search for immigration information from DHS’s vastly more inclusive database, which contains more than 90 million immigration records. Unlike immigration-related information obtained through the NCIC, however, the immigration records DHS maintains are only accessible when officers choose to enter an immigration-specific query, known as an Immigration Alien Query (IAQ). Although the immense search capability of the IAQ may present other concerns about data-sharing and privacy, IAQ searches do not challenge the sanctuary movement in the same way as NCIC searches of the Immigration Violators File because officers can easily avoid running an IAQ if they do not want to learn about immigration status or violations of immigration law. See *Intelligence Sharing: Law Enforcement Support Center*, THE POLICE CHIEF MAG., Feb. 2005, available at http://policechiefmagazine.org/magazine/index.cfm?fuseaction=display&article_id=515&issue_id=22005 (explaining how law enforcement officers run IAQ searches).

128. Nina Bernstein, *Crime Database Misused for Civil Issues, Suit Says*, N.Y. TIMES, Dec. 17, 2003, at A34.

129. Deborah Frazier, *INS Arrests in Region Up 500%, Quick Response Teams Help Swell Numbers of Detentions in Colorado, Utah, Wyoming in 2000*, ROCKY MOUNTAIN NEWS (Denver, Colo.), Jan. 22, 2001, at A4.

130. NCIC 2000 OPERATING MANUAL, *supra* note 89.

131. Weise Interview, *supra* note 105 (adding that other files in the NCIC rely on local enforcement officers to enter the relevant warrant information).

although all of the immigration-related information in the NCIC exists in this single electronic file, a standard search for an individual's name in the NCIC draws information from all eleven wanted persons files; an officer cannot limit her search to exclude data found in the Immigration Violator File.¹³²

The expansive approach to NCIC searches represents a conscious choice by the NCIC's administrators that officers should be provided with the maximum amount of information available, including immigration information.¹³³ Nevertheless, the system does allow limited searches singling out the Convicted Sex Offender Registry File in order to aid local officials in their duties under local measures that require tracking the whereabouts of sex offenders.¹³⁴ The fact that users of the NCIC may limit searches to the sex offender file suggests that the FBI could also configure the NCIC to allow officers to customize searches to exclude the Immigration Violators File.

As with other NCIC hits, an immigration hit alone does not create probable cause for detention.¹³⁵ Instead, the NCIC directs local enforcement officers to contact the Law Enforcement Support Center ("LESC") to verify that the hit information is accurate.¹³⁶ Located in Williston, Vermont, the LESC is a 24-hour information center manned by 300 agents and run by DHS.¹³⁷ The LESC is charged with entering immigration violation data and confirming, when possible, the immigration hits reported by the NCIC.¹³⁸ To accomplish this goal, LESC agents have access to over 100 million immigration records.¹³⁹ In fiscal year 2007, LESC agents confirmed 9,473 immigration-related NCIC hits, increasing the annual confirmation total by almost 3,000 hits from fiscal year 2006.¹⁴⁰

Despite these statistics, studies suggest that the immigration data contained in the NCIC is strikingly inaccurate.¹⁴¹ The Migration Policy Institute analyzed 20,876 NCIC hits from state and local law enforcement agencies using records and determined that 42 percent of immigration hits

132. *Id.*

133. *Id.*

134. *Id.* See generally [Klaaskids.org](http://www.klaaskids.org), Sex Offender Registration & Community Notification Internet Access, <http://www.klaaskids.org/pg-legmeg2.htm> (last visited May 25, 2008) (listing sex offender registration laws by state).

135. LESC Fact Sheet, *supra* note 2.

136. *Id.*

137. *Id.*; Press Release, Immigration and Customs Enforcement, ICE Provides Record Support to Law Enforcement Counterparts (Oct. 22, 2004), available at <http://www.ice.gov/pi/news/newsreleases/articles/lesc102204.htm?searchstring=LESC>.

138. LESC Fact Sheet, *supra* note 2.

139. *Id.*

140. *Id.*

141. GLADSTEIN ET AL., *supra* note 70 (describing the error rate for immigration data in the NCIC). See generally Mary De Ming Fan, *Reforming the Criminal Rap Sheet: Federal Timidity and the Traditional State Functions Doctrine*, 33 AM. J. CRIM. L. 31, 54-65 (2005) (describing general inaccuracies found in the NCIC and discussing "persistent data quality problems").

turned out to be false positives.¹⁴² False positives occurred when the LESC could not verify the accuracy of the immigration violations reported by the NCIC.¹⁴³ The Migration Policy Institute concluded that “[t]he high rate and growing total numbers of unconfirmed NCIC immigration hits likely result in a significant number of wrongful detentions by local police pending clarification by [the] LESC.”¹⁴⁴ The inaccurate records in the NCIC are particularly troubling in light of the fact that the Justice Department administratively discharged the FBI of its statutory duty to ensure the accuracy and completeness of the NCIC in 2003.¹⁴⁵

The Migration Policy Institute’s report also suggested that the Attorney General Ashcroft was disingenuous in announcing that the DOJ added immigration files to the NCIC only to seek local support for “our narrow anti-terrorism mission.”¹⁴⁶ Approximately 85 percent of immigration violators identified in the NCIC are from Latin America.¹⁴⁷ Given that the vast majority of international organizations the Bush administration has designated as “terrorist” are based in Asia and the Middle East, not Latin America,¹⁴⁸ these demographics strongly suggest that the NCIC encourages local enforcement of immigration laws without substantial regard for terrorism concerns.

C. The NCIC’s Negative Impact on Sanctuary Policies

Although the preexisting challenges to sanctuary policies are significant, the increasing availability of immigration information through the NCIC poses a threat of an altogether new form and degree. Local enforcement officers are now potentially privy to immigration information, wanted or not, every time they enter a person’s information into the NCIC. Significantly, while the NCIC does not forcibly compel officers to act in violation of local sanctuary measures, the unfettered availability of immigration data nevertheless undermines sanctuary policies by encouraging local officers to enforce immigration law.

The availability of immigration data in the NCIC had just this effect when a local enforcement officer initiated a traffic stop that ultimately resulted in Maryland resident Hugo Vinicio Hernandez’s deportation.¹⁴⁹ In January 2007,

142. GLADSTEIN ET AL., *supra* note 70, at 3.

143. *Id.*

144. *Id.* at 29.

145. 28 C.F.R. § 16.96 (2007); *see also* Daniel J. Solove & Chris Jay Hoofnagle, *A Model Regime of Privacy Protection*, 2006 U. ILL. L. REV. 357, 379 (discussing the Privacy Act of 1974 and its impact on criminal records information).

146. Ashcroft, *supra* note 8.

147. GLADSTEIN ET AL., *supra* note 70, at 3. The Migration Policy Institute determined this by studying a statistically significant sample of NCIC hits.

148. *See* Press Release, U.S. Dep’t of State, Fact Sheet: Foreign Terrorist Organizations (Oct. 11, 2005), available at <http://www.state.gov/sct/rls/fs/37191.htm>.

149. Ernesto Londoño, *Database is Tool in Deporting Fugitives*, WASH. POST, June 13, 2007, at A1.

a local officer pulled over Hernandez's car after Hernandez changed lanes abruptly on his 5:30 a.m. commute to work.¹⁵⁰ Following standard procedure, the officer ran Hernandez's name through the NCIC.¹⁵¹ When the NCIC produced an immigration-related hit, the officer brought Hernandez to the police station. Upon verifying the accuracy of the hit, the officer transported Hernandez to the county jail, where he was transferred into ICE custody.¹⁵² Within months, Hernandez was deported to Guatemala, leaving behind two American-born children.¹⁵³

Hernandez's story is not unusual. Traffic stops routinely result in deportation orders when an officer learns of a driver's illegal immigration status.¹⁵⁴ Far from accidental, these types of arrests are part of the ICE's strategy for identifying illegal immigrants; the strategy, as an article in *The Wall Street Journal* colloquially described it, is to "[g]et local police to nab [illegal immigrants] on an unrelated offense, such as a traffic infraction."¹⁵⁵ What is remarkable in the Hernandez case, however, is that the arresting police officer in that instance worked for the police department of Takoma Park, Maryland, home to a protective sanctuary law.¹⁵⁶

The Takoma Park sanctuary law failed to prevent Hernandez's detention as a direct result of the inclusion of immigration data in the NCIC. As other local police officers likely do as well, the Takoma Park officer reacted to the NCIC information by detaining Hernandez. Takoma Park's sanctuary law proved inconsequential because the officer did not know that contacting federal officials, as the NCIC instructed when it showed an immigration hit, violated the city's law.¹⁵⁷ Ease of access and immediate directions from the federal database, coupled with a local officer's ignorance or forgetfulness of the sanctuary policy, thereby impeded the operation of the local sanctuary policy.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. See, e.g., Nina Bernstein, *Challenge in Connecticut Over Immigrants' Arrest*, N.Y. TIMES, Sept. 26, 2007, at B1 (Ecuadorian immigrant pulled over for a noisy muffler deported after an NCIC check revealed his immigration record); Miriam Jordan, *Return Flight: Visa Violators Swept Up in Widening Dragnet*, WALL ST. J., Apr. 10, 2008, at A1 (Polish immigrant received deportation order after a police officer discovered his immigration status in the process of issuing a citation for talking on a cell phone while driving); Ann M. Simmons, *N.O. Police Halt Immigration Arrests*, L.A. TIMES, Feb. 9, 2007, at A14 (describing the use of traffic stops to identify illegal aliens in Louisiana).

155. Jordan, *supra* note 154, at A1; see also Press Release, Office of U.S. Senator Patrick Leahy's, Homeland Sec. Official Calls Vt.'s LESC "Crown Jewel" (Mar. 30, 2004), available at <http://leahy.senate.gov/press/200403/033004b.html> (quoting Michael J. Garcia, assistant secretary of the Department of Homeland Security, as saying that the LESC is "the crown jewel of our state and local cooperation efforts").

156. Takoma Park, Md., Ordinance No. 2007-58 (Oct. 29, 2007), available at <http://www.takomaparkmd.gov/clerk/ordinance/2007/or200758.pdf>.

157. Hendrix, *supra* note 46.

Notably, too, Takoma Park's "don't ask" ban on inquiries into citizenship was rendered meaningless by the officer's use of the NCIC. Regardless of his questions, the officer's use of this routine law enforcement tool meant that he could not avoid learning of Hernandez's immigration status. Police supervisors may favor "don't ask" bans precisely because upon learning of a violation, an officer may feel compelled to enforce the law. Ignoring suspected or potential immigration violations is presumably an easier and less conflicting directive for an officer to follow than is dismissing the written reports produced by the NCIC, a trusted law enforcement tool.

Yet, in one of the first cases in this area, the Second Circuit recently held that a coalition of plaintiffs failed to demonstrate a causal connection between the data in the NCIC and immigration arrests made by local authorities. In *National Council of La Raza v. Mukasey*, the Second Circuit rejected the argument that the inclusion of civil immigration records in the NCIC has a "determinative or coercive effect' on state and local law enforcement officers."¹⁵⁸ A coalition of plaintiffs, including the National Council of La Raza, the American-Arab Anti-Discrimination Committee, UNITE HERE!, the New York Immigration Coalition, and the Latin-American Workers Project, sought to enjoin the Attorney General and ICE from including civil immigration records in the NCIC.¹⁵⁹ The Second Circuit dismissed the suit, in part because plaintiffs failed to demonstrate a causal connection between the presence of immigration records in the NCIC and the number of immigration arrests made by local authorities.¹⁶⁰

In finding that there was no causal connection, the court in *Mukasey* found that a local enforcement officer faces no risk of federal retribution or penalty if she disobeys the NCIC instructions to contact federal authorities upon learning of a suspected immigration violation.¹⁶¹ Causation sufficient to demonstrate standing requires that an injury be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court."¹⁶² In applying this standard, the Second Circuit implied that local enforcement officers act independently, and thus causation fails, because officers can ignore immigration data in the NCIC without a threat of retribution.¹⁶³

158. *National Council of La Raza v. Mukasey*, 283 Fed. Appx. 848, 851 (2d Cir. 2008), (citing *Bennett v. Spear*, 520 U.S. 154, 169 (1997)).

159. *Id.* The plaintiffs raised claims on two grounds. First, they argued that the NCIC statute, 28 U.S.C. § 534, expressly enumerates the records that may be included in the NCIC and therefore forbids the defendants from entering and distributing civil immigration records via the database. Second, plaintiffs claim that Congress has enacted a comprehensive federal immigration enforcement scheme that preempts state and local authority to enforce civil immigration laws. *Nat'l Council of La Raza v. Gonzales*, 468 F. Supp. 2d 429 (E.D.N.Y. 2007).

160. *Mukasey*, 283 Fed. Appx. at 851.

161. *Id.* at 852.

162. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

163. *Mukasey*, 283 Fed. Appx. at 852.

Although the court dismissed for failure to show causation, the *Mukasey* holding does not preclude recognition of the NCIC as a relevant factor influencing immigration enforcement activities.¹⁶⁴ Given the independent ability of law enforcement officers to react to immigration data, the NCIC may not *cause* local officer to enforce immigration law.¹⁶⁵ Yet, the NCIC's effect is no less significant for policymakers hoping to maintain effective sanctuary policies because although officers *can* ignore the immigration data presented by the NCIC, officers who do not recognize or exercise this right will utilize the immigration data in the NCIC in violation of local sanctuary policies. A police officer who is not intimately aware of her jurisdiction's sanctuary policy may, quite naturally, detain a person for immigration-related infractions. As a result, by incorporating immigration queries into NCIC searches, the federal government has extended its influence far beyond the reach of the 1996 laws that impeded "don't tell" sanctuary measures.¹⁶⁶

The impact of the NCIC's immigration files on police interactions with illegal immigrants will continue to jeopardize the sanctuary movement if local law enforcement agencies do not address the effects of the NCIC. The problems evident in the Hernandez case exist nationwide. Despite the Second Circuit's holding in *Mukasey* that the NCIC does not cause local officers to enforce immigration laws, the ready availability of immigration data undoubtedly encourages local enforcement on a quieter level.¹⁶⁷ Officers unaware of local sanctuary policies or unpersuaded as to the purposes of such policies have every reason to utilize the information presented by the NCIC. Only by reconsidering and refining their database uses and sanctuary policy designs can local communities enact sanctuary policies likely to offer a true promise of reprieve from local enforcement.

IV

PROPOSED SOLUTIONS

If cities and states intend to operate as sanctuaries, policymakers and law enforcement officers must know about, and respond to, the NCIC. The three complementary proposals detailed below suggest how cities and states may prevent the immigration data in the NCIC from undermining local sanctuary policies. First, sanctuary proponents should become active and informed consumers of criminal information database services. Second, sanctuary proponents should enact more explicit policies that clearly consider when and

164. See 13A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 3531.5 (3d ed. 2008) (noting that an act may be the "cause in fact" of an alleged injury while nevertheless failing to satisfy the causation prong due to intervening causes).

165. See *Mukasey*, 283 Fed. Appx. at 852.

166. See Pub. L. No. 104-193, 110 Stat. 2105 (1996); Pub. L. No. 104-208, Division C, 110 Stat. 3009, 546 (1996); see *supra*, text accompanying notes 49-57.

167. *Mukasey*, 283 Fed. Appx. at 851.

how the NCIC and the immigration data it reveals may be used by local enforcement officers. Finally, advocates should collaborate with local enforcement officers to ensure that knowledge and field procedures comport with local sanctuary policies.

A. Solution 1: Utilize Other Databases

Sanctuary cities and states must become informed consumers and strive to learn more about criminal information databases. Localities must first examine and understand the information needs of their local enforcement officers. Rather than relying on the NCIC by default, localities that want to maintain functional sanctuary policies must understand the other available database options. Policymakers may then find that alternative criminal information databases can deliver the same benefits to officers as the NCIC without disseminating immigration-related information.

Privately run subscription information services are one type of alternative to the NCIC.¹⁶⁸ For example, a corporation in Arizona runs a data-mining program called COPLINK that compiles criminal information.¹⁶⁹ According to COPLINK, its system compiles data available in incomplete and incompatible databases and records management systems.¹⁷⁰ For example, if a local agency stores its historical records in one database and its outstanding arrest warrants in another, officers may not be able to examine both simultaneously. COPLINK organizes all of an agency's data so that officers can access information through a single platform.¹⁷¹ In addition, jurisdictions purchasing COPLINK's services allow the company to access their local records, permitting COPLINK to grow its information warehouse as its business expands.¹⁷²

Almost 1,600 law enforcement agencies already use COPLINK,¹⁷³ and the program may offer at least three distinct advantages to cities and states with sanctuary policies. First, COPLINK allows local enforcement officers to limit when they will learn of immigration records.¹⁷⁴ COPLINK still allows local enforcement officers to access ICE records, but requires users to make immigration inquiries on a query-by-query basis.¹⁷⁵ Unless local officers make

168. Compare this proposal, with Erin Murphy, *The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence*, 95 CALIF. L. REV. 721, 777-87 (2007) (discussing the benefits of using independent forensic laboratories to assess DNA evidence, but suggesting oversight mechanisms to ensure accuracy and information sharing).

169. COPLINK, <http://www.coplink.com/> (last visited May 25, 2008).

170. *Id.*

171. *Id.*

172. Telephone Interview with Bob Fund, COPLINK Prod. Manager, Knowledge Computing Corp. (May 6, 2008) [hereinafter Fund Interview].

173. *Id.*

174. *Id.*

175. *Id.*

a specific request for ICE records, they will not learn about immigration records in the course of using COPLINK.¹⁷⁶ Second, COPLINK allows local police jurisdictions to set their own standards for data accuracy; agencies must participate in decisions related to how much identifying information must match before COPLINK will suggest that two separate records concern the same individual.¹⁷⁷ This participatory process could substantially reduce the error rates that now plague the immigration data available through the NCIC.¹⁷⁸ Finally, COPLINK offers information that is unavailable through the NCIC.¹⁷⁹ This additional information includes historical records about local criminal activities, suspects, and the known *modus operandi* of past offenders—all information that allows officers to discover patterns and possible suspects.¹⁸⁰ “It’s going from the horse-and-buggy days to the space age, that’s what it’s like,” according to Tucson, Arizona, Police Sergeant Chuck Violette.¹⁸¹

Alternative databases like COPLINK are not without their disadvantages. Most significantly, alternative databases do not include all of the records available through the NCIC. COPLINK, for example, does not contain warrants from local enforcement agencies that do not subscribe to COPLINK.¹⁸² Some federal criminal records are likewise unavailable through COPLINK despite the company’s efforts to integrate FBI and DHS files into COPLINK’s platform.¹⁸³ Moreover, local enforcement agencies cannot always afford the commercial databases’ fees. While local enforcement agencies can access the NCIC without cost, COPLINK and other alternative databases charge for their services. A COPLINK contract in Missouri or Kansas, for example, costs an estimated \$1 million for the first year.¹⁸⁴

Local collaboration efforts provide another type of alternative to the NCIC. Many local law enforcement agencies have already begun creating their own data-sharing networks, often called nodes, by working together with other

176. *Id.*

177. *Id.*

178. See GLADSTEIN ET AL., *supra* note 70, at 13.

179. Fund Interview, *supra* note 172.

180. *Id.*

181. Robert O’Harrow Jr. & Ellen Nakashima, *National Dragnet is a Click Away; Authorities to Gain Fast and Expansive Access to Records*, WASH. POST, Mar. 6, 2008, at A1.

182. Fund Interview, *supra* note 172.

183. Fund Interview, *supra* note 172; see also Press Release, COPLINK, COPLINK Innovates with LEXS/National Information Exchange Model (NIEM) Compliance for Law Enforcement Agencies Nationwide (July 1, 2008), available at http://www.coplink.com/pr08_niem0701081.htm [hereinafter Press Release, COPLINK].

184. *KC-Area Police to Share Crime Information COPLINK Program Gives Police More Access to Details*, KMBC-TV 9 (Kansas City, Mo.), available at http://www.coplink.com/news08_kmbc0722081.htm. Federal grants, including those from the National Institute of Justice and Homeland Security Administration, may help to defray some of these costs. Fund Interview, *supra* note 172; see also Press Release, COPLINK, *supra* note 175 (discussing grants as a partial source of funding for the Missouri and Kansas contract).

jurisdictions.¹⁸⁵ Local enforcement agencies may be able to formalize these agreements by participating in Law Enforcement Information Exchange ("LInX"), which is run through the Navy Criminal Investigative Service.¹⁸⁶ LInX creates regional data warehouses intended to allow participating agencies to access each other's records.¹⁸⁷ In early 2009, seven distinct regions—with a combined total of approximately 460 participating local police agencies—had adopted LInX agreements and three other regions were in the process of approving LInX projects.¹⁸⁸

LInX agreements benefit local enforcement agencies in several ways. LInX participants must create a governance infrastructure that gives local authorities a say in how the LInX system runs.¹⁸⁹ Because they may vote on what constitutes relevant data, local enforcement officers interested in maintaining strong sanctuary policies could shape a regional LInX system that strengthens their access to criminal information without exposing officers to unwanted immigration information. Conveniently, LInX agreements also eliminate the NCIC's call-in verification requirement by giving local enforcement officers direct access to other agencies' databases, thereby enabling officers independently to verify that a warrant remains outstanding.¹⁹⁰

If a significant number of sanctuary cities and states become informed consumers of database services, officials may gain leverage to encourage federal authorities to modify the NCIC. The NCIC's inclusion of civil immigration data is already controversial; both the IACP and the advisory board of local enforcement officials who help to direct the content of NCIC have expressed their disagreement with the entry of civil immigration violation records into the database.¹⁹¹ Since the NCIC relies on the continued cooperation of local enforcement offices in routinely adding their criminal warrants into the database, the defection of jurisdictions from the NCIC in favor of other databases would weaken the data-collection and information-sharing functions of the NCIC. Thus, if many local jurisdictions discontinue their participation in the NCIC, the boycott could encourage federal authorities to remove immigration records from the NCIC, or to reprogram the system to

185. O'Harrow & Nakashima, *supra* note 181, at A1.

186. Law Enforcement Information Exchange, <http://www.ncis.navy.mil/linx/index.html> (last visited May 25, 2008) (noting that LInX is currently available in "areas of strategic importance to the Department of the Navy").

187. Law Enforcement Information Exchange, Technical Overview, <http://www.ncis.navy.mil/linx/technical.html> (last visited May 25, 2008); see also Mary Beth Sheridan, *System Lets Agencies in Area Share Data*, WASH. POST, Nov. 29, 2007, at B3.

188. Law Enforcement Information Exchange, <http://www.ncis.navy.mil/linx/index.html> (last visited May 25, 2008) (see map and left tool bar to explain different regions).

189. Law Enforcement Information Exchange, Steps in Creating a LInX Success, <http://www.ncis.navy.mil/linx/steps.html> (last visited May 25, 2008).

190. *Id.*

191. See MAJOR CITIES CHIEFS POSITION PAPER, *supra* note 69; Wishnie, *supra* note 13, at 1101.

allow searches to exclude the Immigration Violators File.¹⁹²

Once local law enforcement agencies exercise their power in the database market, they may also gain leverage to influence the design and development of the FBI's new, emerging federal database system: the National Data Exchange (N-DEx). N-DEx is an \$85 million database designed to expand the current capacity of the NCIC.¹⁹³ Although the N-DEx is currently slated to include information from ICE,¹⁹⁴ local jurisdictions with sanctuary policies could advocate for a platform that allows local agencies to use the N-DEx without accessing all of the available ICE information. Because N-DEx is currently in the development stage, such efforts could influence the next generation of law enforcement data sharing.

Despite the potential benefits of alternative information-sharing measures, sanctuary jurisdictions may determine that replacing or supplementing local enforcement officers' use of the NCIC is undesirable or cost-prohibitive. The remaining two proposals suggest how sanctuary cities can overcome some of the negative effects of the availability of immigration data through the NCIC without replacing their use of the NCIC altogether.

B. Solution 2: Reform Sanctuary Ordinances

Policymakers at the local government level must consider whether their sanctuary policies are effective despite the growing availability of immigration information through the NCIC. Policymakers must contemplate when the NCIC should be used and how officers should react to immigration information. Given the technical nature of these decisions, policymakers should be especially careful to act in concert with local law enforcement officials in designing these revisions.

First and foremost, for sanctuary policies to remain effective, policymakers must recognize that use of the NCIC may reveal immigration information. The fact that local enforcement officers may learn of someone's immigration status through the NCIC without directly seeking out such information strongly suggests that "don't ask" policies are outdated, and must be reconsidered.

Communities should reform sanctuary policies to stipulate situations in which law enforcement officers should use—or should not use—the NCIC.

192. See generally John T. Soma, Maury M. Nichols, Stephen D. Rynerson, Lance A. Maish & Jon David Rogers, *Balance of Privacy vs. Security: A Historical Perspective of the USA Patriot Act*, 31 RUTGERS COMPUTER & TECH. L.J. 285, 343 (2005) ("[W]hile technology may facilitate increasingly intrusive surveillance, sufficient social condemnation can curb its use, pulling the privacy-security balance back into equilibrium.").

193. Fed. Bureau of Investigation, N-DEx Overview, http://www.fbi.gov/hq/cjisd/ndex/ndex_overview.htm (last visited May 25, 2008); see also O'Harrow Jr. & Nakashima, *supra* note 181.

194. Fed. Bureau of Investigation, N-DEx Scenario Two, <http://www.fbi.gov/hq/cjisd/ndex/scenario2.htm> (last visited May 25, 2008).

Doing so will force policymakers and police officials to contemplate when gaining information from the NCIC outweighs allowing local officers to remain ignorant of immigration status, and vice versa. Deportations like Hugo Vinicio Hernandez's likely would not have happened if Takoma Park had directed its law enforcement officers not to run NCIC checks during traffic stops. Although local policymakers may determine that NCIC checks during traffic stops are useful enough that, on balance, the integrity of the sanctuary policy is of secondary importance, policymakers should consciously weigh these policy concerns. For instance, even in a jurisdiction that embraces the NCIC as an important tool in traffic stops, policymakers should ask: is it necessary to search the database when interviewing crime victims or witnesses? Is it necessary when issuing misdemeanor citations for violations like jaywalking or loitering? The answers will vary by jurisdiction, and will likely hinge on the delicacy of police relations with local immigrant communities. In light of the NCIC, communities need to consider these questions actively, in order to adopt sanctuary policies with meaningful boundaries.

In addition to deciding when to use the NCIC, communities should also implement sanctuary policy reforms that clarify what information officers should share with federal authorities. Although sanctuary policies may not effectively forbid local enforcement officers from notifying federal officials when they learn of immigration information,¹⁹⁵ policies can *advise* local enforcement officers not to share this information. As the Supreme Court held in *Town of Castle Rock*, the "well established tradition of police discretion" grants local enforcement officers the authority to determine when and how they will enforce the law.¹⁹⁶ As a result, advisory policies encouraging officers not to share information may be effective despite federal preemption questions, especially if local officers understand the purposes of the sanctuary ordinance.

Directives not to share information, however, are often components of ineffective or misunderstood sanctuary policies. In New York City, for example, sanctuary advocates and city counsel members expressed frustration upon learning that local enforcement officials commonly detain people for suspected immigration violations if the NCIC shows an immigration-related hit.¹⁹⁷ City counsel members felt the practice violated the "spirit" of New York City's Executive Order 41, which directs officers not to disclose confidential information about immigration status except in specific circumstances.¹⁹⁸ The

195. See *supra*, text accompanying notes 49-57; see also *City of New York v. United States*, 179 F.3d 29 (2d Cir. 1999).

196. *Town of Castle Rock*, 545 U.S. at 751.

197. Nina Bernstein, *Police Report Noncitizens to U.S., Official Says*, N.Y. TIMES, Apr. 23, 2005, at B3 ("Pressed by [Councilman Kendall Stewart of Brooklyn] to say whether any law required the police to notify federal immigration authorities in database cases, [police official] Mr. Doepfner acknowledged he did not know of any, but he said, 'We believe it's prudent and it's a good law enforcement practice.'").

198. *Id.*; see also New York City Executive Order No. 41, City-Wide Privacy Policy and

sanctuary movement would be better served if executive orders and laws included more specific directions and did not rely on a philosophy or “spirit” to guide police activities.¹⁹⁹

A number of communities with sanctuary policies have already adopted measures that clarify how local enforcement officers should treat suspected immigration violators. At least three sanctuary cities have already enacted policies that specifically address how officers may respond to learning about outstanding immigration-related warrants. In Chapel Hill, North Carolina, and New Haven, Connecticut, sanctuary policies direct local enforcement officers never to enforce civil immigration warrants;²⁰⁰ while in Houston, Texas, police officials are directed only to arrest people on immigration warrants if federal immigration authorities intend to file criminal charges.²⁰¹ The different approaches adopted by Chapel Hill, New Haven, and Houston demonstrate the varied approaches that sanctuary cities may take to achieve clearer and ultimately more effective sanctuary policies.

Ultimately, once policymakers are prepared to make informed decisions about the specific contours of their sanctuary policy, they will be better equipped to implement more effective policies that can withstand the threats that the NCIC poses.

C. Solution 3: Invest in Training Improvements

In Takoma Park, the officer who turned Hugo Vinicio Hernandez over to federal officers indicated that he did not know about Takoma Park’s sanctuary policy.²⁰² Even the first agency to implement a sanctuary policy, the LAPD, noted in early 2001 that the personnel manual for local enforcement officers did not include any procedures to guide officer compliance with the department’s sanctuary policy.²⁰³ Especially in light of changes to the NCIC, policymakers in sanctuary cities and states must ensure that local enforcement officers receive the training necessary to understand the nuances and purposes of their sanctuary policies.

Amendment of Executive Order No. 34 Relating to City Policy Concerning Immigrant Access to City Services (Sept. 17, 2003), *available at* http://www.nyc.gov/html/imm/downloads/pdf/exe_order_41.pdf.

199. Optimally, local jurisdictions should follow San Francisco’s example and consider hiring someone to oversee the sanctuary policy and work with government agencies to see that it is properly carried out. *See* Hagen Interview, *supra* note 47.

200. Londoño, *supra* note 149; *see also* New Haven, Conn. Police Dept., General Order 06-2 (2006) (“Officers shall not make arrests based on administrative warrants for arrest or removal entered by ICE into the FBI’s National Crime Information Center (NCIC) database, including administrative immigration warrants for persons with outstanding removal, deportation or exclusion orders. Enforcement of the civil provisions of U.S. immigration law is the responsibility of federal immigration officials.”).

201. Londoño, *supra* note 149.

202. Hendrix, *supra* note 46.

203. RAMPART INDEPENDENT REVIEW PANEL, *supra* note 88.

Effective trainings must include three elements: (1) an explanation of the reasons for the local sanctuary policy; (2) instructions on how to understand immigration information, particularly as the NCIC will display it; and (3) directions concerning how and when to act on this information. First, by instructing officers on the motivation for local sanctuary policies, policymakers can open lines of communication and convince local enforcement officers of the merits of the sanctuary policies with which they are expected to comply. On the other hand, ambiguity over the purpose of the local sanctuary policy is likely to reduce concern and compliance. For instance, officers in cities with large immigrant populations should learn about the benefits to community relations that can come from well-publicized and consistent sanctuary policies. In other locations, and particularly more conservative districts, fiscal concerns and local independence from federal direction may prove more resonant.²⁰⁴

Second, by training officers to differentiate between different types of immigration violations, policymakers can help ensure that local enforcement officers will comply with local sanctuary policies. Many sanctuary policies protect only those who have committed civil, but not criminal, immigration violations.²⁰⁵ However, officers using the NCIC may fail to differentiate between civil and criminal offenders because distinguishing between civil and criminal immigration hits in the NCIC is not intuitive. Both civil and criminal immigration hits in the NCIC indicate to an officer that an immigration warrant is outstanding; to someone untrained in the nuances of immigration law and the vocabulary of the NCIC, the term warrant may suggest that the hit is necessarily related to a criminal matter.²⁰⁶ As a result, an officer may unintentionally treat someone with a civil immigration infraction as if they were ineligible for the protections of the local sanctuary policy.

To combat the lack of police knowledge about immigration law, sanctuary advocates and legal scholars in New Haven, Connecticut, have been working with local law enforcement officers to familiarize officers with the subtle distinctions between the appearances of criminal versus civil immigration hits in the NCIC.²⁰⁷ Policymakers and sanctuary proponents should implement similar education programs in other sanctuary cities and states where policymakers want to curb local enforcement of civil immigration violations.

Finally, once sanctuary cities and towns have revised their policies to clarify when and how officers should act on immigration hits in the NCIC, policymakers must clearly communicate this information to local officers. In San Francisco, for example, the city created a new position—the Immigrants'

204. See, e.g., H.R.J. Res. 22, 23rd Leg., 1st Sess. (Alaska 2003).

205. See, e.g., San Francisco Admin. Code § 12H.2-1 (1993).

206. NAT'L CRIME INFO. CTR., 2000 OPERATING MANUAL: IMMIGRATION VIOLATOR FILE, available at https://olets-info.olets.state.ok.us/cjismanuals/pdf/Immigration_violator.htm.

207. PowerPoint Presentation: Training on General Order 06-2, New Haven (Conn.) Police Dep't (on file with author).

Rights Administrator—in order to dedicate a position in City Hall to help local agencies design policies consistent with San Francisco's sanctuary policy.²⁰⁸ Also, San Francisco law enforcement officials have developed Field Arrest Cards that explain how to abide by the city's sanctuary policies when stopping or questioning people.²⁰⁹ Together, these administrative efforts transform sanctuary policies from philosophical declarations into practical protections.

CONCLUSION

By arming themselves with a thorough understanding of the threat posed by the NCIC, sanctuary advocates can ensure that sanctuary policies achieve their intended purpose. However, even as sanctuary advocates implement the proposals advanced in this Comment, they must also remain attentive to new developments in immigration law. The political sensitivity of immigration reform and the potential volatility of immigration law suggest that sanctuary reform will remain a necessary and ongoing process.

Recent events suggest that legislators and judges could dramatically affect the future of the sanctuary movement. For example, Congress has repeatedly considered the Clear Law Enforcement for Criminal Alien Removal Act ("CLEAR Act"), which would condition the receipt of federal funding on enacting measures to quash local sanctuary policies.²¹⁰ The CLEAR Act has yet to pass, but its provisions relating to sanctuary policies indicate the devastating effect that federal laws could have on the sanctuary movement if Congress employs its powers under the Spending Clause to coerce local enforcement.²¹¹

Court decisions could also substantially alter the sanctuary movement. In 2006, a federal judge overseeing a record expungement proceeding suggested that he would order the federal government to remove all noncriminal immigration information from the NCIC if a plaintiff brought suit.²¹² Further, as illustrated in *Mukasey*, courts are beginning to address these issues. Their holdings could drastically reshape local enforcement of immigration.²¹³

Yet despite uncertainties about the future of the sanctuary movement, local officials must uphold locally adopted decisions to offer sanctuary. In Takoma Park, an officer unintentionally violated the local sanctuary law by

208. *Id.*

209. Hagen Interview, *supra* note 47.

210. Compare Clear Law Enforcement for Criminal Alien Removal Act, H.R. 2671, 108th Cong. (2003), with Clear Law Enforcement for Criminal Alien Removal Act, H.R. 3137, 109th Cong. (2005) (amending 2003 proposal to threaten withholding federal funds from states that have laws, guidelines, or procedures that prevent local police officers from enforcing federal immigration law).

211. See Daniel Booth, Note, *Federalism on Ice: State and Local Enforcement of Federal Immigration Law*, 29 HARV. J.L. & PUB. POL'Y 1063 (2006).

212. *Doe v. Immigration & Customs Enforcement*, No. M-54 (HB), 2006 U.S. Dist. LEXIS 28300 (S.D.N.Y. May 9, 2006).

213. *National Council of La Raza v. Mukasey*, 283 Fed. Appx. 848, 851-52 (2d Cir. 2008).

acting on immigration information learned through the NCIC, and thereby rendered locally adopted offers of “sanctuary” meaningless. This outcome undermines the community trust that sanctuary policies often seek to bolster. It may also contravene a community’s decision not to use its own resources to enforce federal immigration law.

To avoid the Takoma Park outcome, sanctuary advocates must understand that, by exposing officers to information, the NCIC encourages local police officers to enforce immigration laws. Applying the solutions examined here will allow cities and states to better regulate when local enforcement officers will learn about and detain individuals suspected of immigration law violations. By adopting these solutions, cities and states can ensure that their sanctuary policies offer the safe haven they were designed to provide.